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11 UNITED STATES BANKRUPTCY COURT
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13 NORTHERN DISTRICT OF CALIFORNIA
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11 In Re
12 DAVID BRYAN,
13 Debtor

Case No.: 10-33670-TEC
Chapter 7
DEBTOR'S OPPOSITION TO
MOTION FOR RELIEF FROM
AUTOMATIC STAY
Property: 4148 23rd St., San
Francisco, CA 94114
Date: 6 Dec 2010
Time: 1:00 p.m.
Courtroom: 23

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1 TO THE CREDITORS, CREDITORS' ATTORNEY AND OTHER INTERESTED PARTIES:
2 NOTICE IS HEREBY GIVEN that in the location listed above at the date
3 and time listed above, debtor in the above-captioned matter will
4 move to oppose Movant, U.S Bank National Association ("U.S. Bank"),
5 in its Motion for Relief of Automatic Stay, on the grounds listed in
6 the instant Opposition.

7
8 **SUMMARY OF FACTS**

- 9 1. On or about 3 January 2007, David R. Bryan ("Bryan") executed a
10 promissory note ("the Note") in the amount of \$1,000,000. The
11 note named as Lender, Ampro Mortgage, A division of United
12 Financial Mortgages Corp. ("Ampro") A copy of the Note was
13 attached to Movant's Motion for Relief from Automatic Stay, as
14 Exhibit A and incorporated here by reference.
- 15 2. On or about 3 January 2007, Bryan also executed a Deed of Trust
16 ("the Deed"). The Deed named the Lender as Ampro and the
17 Trustee as Alliance Title ("Alliance"). Curiously, the Deed
18 also named Mortgage Electronic Registration Systems, Inc.
19 ("MERS") as the beneficiary. The Deed reads that "MERS is a
20 separate corporation that is acting solely as a nominee for
21 Lender and Lender's successors and assigns." A copy of the Deed
22 was attached to Movant's Motion for Relief from Automatic Stay
23 as Exhibit B and incorporated here by reference.
- 24 3. On 23 July 2008, MERS caused to be recorded an Assignment of
25 Deed of Trust ("Assignment of Deed") with the San Francisco
26 County Recorder's Office. A copy was attached to Movant's Motion
27 for Relief from Automatic Stay as Exhibit B and incorporated
28 here by reference. In the Assignment of Deed, MERS purportedly

1 "grants, assigns and transfers to U.S. Bank, National
2 Association, as Trustee for JPMALT 2007-A2 all beneficial
3 interest" MERS claims the power to conduct the assignment as
4 "nominee for AMPRO Mortgage. . ." The Assignment of Deed was
5 signed in Texas by David B. Seybold, as "Vice President" of
6 MERS.

7 4. Movant has filed a Declaration in Support of Relief from
8 Automatic Stay ("Javen Declaration"). Krystal Javen is the
9 author of the declaration, and is an employee of Chase Home
10 Finance, LLC, the loan servicing agent for Movant. The Javen
11 Declaration is incorporated here by reference. Javen does not
12 indicate that she is familiar with the business records of
13 Movant.

14 5. Javen asserts that "Movant qualifies as the Note Holder." See
15 Javen Declaration.

16 6. Javen has not demonstrated any personal knowledge of Movant's
17 business records.

18 7. The copy of the Note proffered by movant has a stamp indicating
19 "see attached allonge." The allonge purports to show the
20 indorsement by one Arelene Soulette, acting as Asst Vice
21 President of Ampro, indorsing the Note to JP Morgan Chase Bank,
22 N.A. The allonge is undated.

23 8. JP Morgan Chase has been under investigation in Ohio for
24 submitting fabricated documents. See **Request for Judicial**
25 **Notice of Ohio Investigation.**

26 **Legal Argument**

27 The issue is whether Movant has the standing to move for relief from
28 the automatic stay. The rule is that "[a]n action must be

1 prosecuted in the name of the real party in interest." Fed R. Civ.
2 P. 17(a)(1). Specifically, a motion for relief from stay can only
3 be brought by a real party in interest. In re Hwang, 396 B.R. 757,
4 766 (Bankr. C. D. Cal. 2008). To be a real party in interest, a
5 Movant must demonstrate a "pecuniary interest." In re Sheridan, WL
6 631355 (Bkrtcy. D. Idaho 2009) at *4. As to the burden of proof,
7 "in general . . . creditors moving for a relief from stay should
8 establish a prima facie¹ case that they have the standing to enforce
9 the underlying note or obligation. In re Aniel, 427 B.R. 811, 816
10 (Bankr. N. D. Cal. 2010). The holding of the note is required since
11 as the US Supreme Court has held, "[t]he note and mortgage are
12 inseparable; the former as essential, the latter as an incident. An
13 assignment of the note carries the mortgage with it, while an
14 assignment of the latter alone is a nullity." Carpenter v. Longan,
15 83 US 217,274 (1873).

16
17 In the instant case Movant asserts via the Javen Declaration that it
18 is the holder of the note, and thus has a pecuniary interest in Mr.
19 Bryan's property.

20
21 Thus, there are two sub-issues here; whether Movant took possession
22 of the Note such that it is the holder, and whether MERS had the
23 authority to assign the Deed of Trust.

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27 ¹ "Prima Facie evidence. Evidence good and sufficient on its face. Such evidence as,
28 in the judgment of the law, is sufficient to establish a given fact, or the group
or chain of facts constituting the parties claim or defense, and if not rebutted or
contradicted, will remain sufficient..." Black's Law Dictionary, (6th ed. 1990) p.
1190

1 **Movant is not the holder**

2 Movant asserts, via the Javen Declaration, that it is the holder of
3 the note. The rule in California is that the holder receives the
4 instrument via negotiation, which is defined as "a transfer of
5 possession, whether voluntary or involuntary, of an instrument by a
6 person other than the issuer to a person who thereby becomes its
7 holder." Cal. Comm. Code § 3201(a). Negotiation of a note that is
8 payable to an identified person, requires "transfer of possession of
9 the instrument and its indorsement by the holder. . ." unless the
10 instrument is payable to bearer. Cal. Comm. Code § 3201(b) (2009).
11 Regarding indorsements, the majority view is that the indorsement
12 must be on the negotiable instrument, unless there is no room for
13 the indorsement on the instrument. Pribus v. Bush, 118 Cal. App. 3d
14 1003, 1008 (Cal. Ct. of Appeals, 4th Dist. 1981), applied also in
15 Adams v. Madison Realty & Development, Inc., 853 F 2d 163, 169
16 (Court of Appeals, 3rd Circ. 1988). The court's logic in Pribus was
17 that

18 . . .a person's signature, innocently made upon an innocuous
19 piece of paper, could be fraudulently attached to a negotiable
20 instrument as a purported indorsement. The majority rule, while
21 not eliminating these methods of fraud, certainly reduces the
22 opportunities for their use. Pribus at FN 7.

23 In the instant case, Movant claims, via the Javen Declaration, that
24 it is the holder of the Note. There are several problems with the
25 assertion. The problems are lack of personal knowledge, no evidence
26 of transfer of possession, and inadequate indorsement.

27
28 Regarding personal knowledge, the rule is that "[a] witness may not

1 testify to a matter unless evidence is introduced sufficient to
2 support a finding that the witness has personal knowledge of the
3 matter." Fed. R. of Ev. 602. In the Javen Declaration, Javen
4 asserts that "Movant qualifies as the Note Holder." However, Javen
5 does not explain what personal knowledge she has to indicate the
6 basis for her testimony. Since she is an employee of Chase Home
7 Finance, LLC, and not Movant, we cannot assume she has knowledge of
8 Movant's business records. Javen indicates no personal knowledge of
9 Movant's business records either. Since she completely lacks
10 personal knowledge, Javen may not testify to the matter of whether
11 Movant is the note holder.

12
13 Regarding transfer of possession, it is a necessary element of
14 becoming a holder of the Note, a process known as negotiation in
15 California. Cal. Comm. Code § 3201(b) (2009). In the instant
16 situation, Movant has not demonstrated that it took possession of
17 the Note. As discussed above, the statement by Javen regarding
18 Movant's status as holder is simply conclusory and lacks evidentiary
19 support. Therefore, Movant has presented no evidence that it took
20 possession of the Note, as required by California law to become the
21 holder.

22
23 Even if Movant argues that it somehow took possession of the Note,
24 the Note was/is improperly indorsed. To prevent fraud, California
25 and Federal courts have held that the indorsement should be on the
26 document unless there is no space. Pribus, 118 Cal. App. 3d at
27 1008, Adams, 853 F 2d at 169. In the instant case, the Note
28 proffered by Movant lacks an endorsement on the document. Rather,

1 the Note has a stamp indicating "see allonge." There is an undated
2 allonge, i.e. a piece of paper with an indorsement signing over the
3 Note to JP Morgan Chase Bank N.A. There is pretty clearly plenty of
4 space on the face of the Note. Thus, the indorsement should have
5 been on the Note instead of via an allonge.

6
7 Movant may argue that concerns over the use of an allonge are
8 overblown and of little concern to the way business is done in the
9 21st century. However, Movant would be incorrect; concerns over
10 fraud in real estate transactions have grown dramatically in the
11 last year. It seems that every day brings a new revelation
12 regarding document fraud, wrongful foreclosures and total misconduct
13 by major financial institutions. JP Morgan Chase has been part of a
14 scandal regarding what the Ohio Attorney General referred to as
15 false court documents. The Pribus court was concerned about
16 signatures "innocently made" on "innocuous piece of paper"
17 providing a potential source of fraud. That is exactly the problem
18 with the proffered Note; namely, that the signature allegedly
19 indorsing the Note over to JP Morgan Bank could have been made for
20 another reason, innocently on a sheet of paper, and then just
21 slipped into the file and submitted to the court. Requiring that
22 indorsement take place on the instrument if space exists helps
23 reduce opportunities for fraud.

24
25 In light of of the serious allegations in Ohio, the court should
26 follow the Pribus rule and disallow the indorsement via allonge
27 presented by Movant.

28 /

1 Since Movant's Declarant lacks personal knowledge, Movant cannot
2 demonstrate that it (or even JP Morgan Chase Bank) took possession
3 of the Note, and the Note is improperly indorsed, then Movant has
4 not demonstrated a prima facie case that it is indeed the holder of
5 the note. Since it is not the holder of the Note, Movant lacks a
6 pecuniary interest in the litigation, because it is not entitled to
7 enforce the Note. Therefore, Movant lacks the requisite standing as
8 a real party in interest. Thus, per Fed R. Civ. P. 17(a)(1), Movant
9 cannot bring a motion for relief from the automatic stay.

10 11 **Assignment of the Deed of Trust**

12 Movant may try to assert that US Supreme Court precedent is not
13 binding. Movant can argue that even if it lacks a pecuniary
14 interest via the Note, the fact that it received assignment of "all
15 beneficial interest" in Mr. Bryan's property from MERS via the
16 Corporation Assignment, gives Movant all the pecuniary interest it
17 requires. Mr. Bryan strenuously objects to this characterization as
18 departing from established law and precedent. Nonetheless, as the
19 below analysis will show, Movant also failed to receive assignment
20 of the Deed of Trust.

21
22 The issue then is whether MERS had the authority to assign said
23 beneficial interests from the Deed of Trust to Movant. MERS
24 executed the Assignment of the Deed as a "nominee" for Ampro
25 Mortgage, the Lender. MERS has specifically been found to have no
26 interest in properties registered with its system. In Nebraska, the
27 the court found that MERS "only holds legal title to members'
28 mortgages in a nominee capacity and is contractually prohibited from

1 exercising any rights with respect to the mortgages (i.e.,
2 foreclosure) without the authorization of the members." Mortgage
3 Electronic Registration Systems vs. Nebraska Dept. of Banking, 270
4 Neb. 529, 530 (Nebraska, 2005). Furthermore, "MERS has no
5 independent right to collect any debt because MERS itself has not
6 extended credit, and none of the mortgage debtors owe MERS any
7 money." Id. at 535. Since MERS has not extended credit to Bryan,
8 and has no right to receive payments on the Note, MERS had no
9 pecuniary interest in the subject property. Since MERS has no
10 actual beneficial interest in the note, then it cannot convey any
11 beneficial interests from the Deed of Trust to Movant. Therefore,
12 Movant cannot argue that it has a pecuniary interest in Mr. Bryan's
13 property from the Deed of Trust.

14
15 Since Movant has not proffered evidence that it has a pecuniary
16 interest in Mr. Bryan's property, via a negotiated note or
17 otherwise, Movant has failed to present a prima facie case in
18 support of its Motion to lift the automatic stay.

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1 **PRAYER FOR RELIEF**

2 In light of the above legal arguments, Debtor respectfully prays for
3 an order from the court as follows:

- 4 1. That the subject motion for relief from automatic stay be
5 denied.
6 2. That the court disallow the collection of protection payments
7 from Mr. Bryan, by Movant.
8 3. That the court order Movant to pay Debtor's attorneys fees and
9 costs incurred as a result of filing the instant opposition.
10 4. Any other relief that the court deems just and appropriate under
11 the circumstances.
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13 Dated: _23 NOV 2010_____

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15 _____/s_____
16 Timothy Y. Fong
17 Attorney for debtor David Bryan
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